
(1979) 02 PAT CK 0001
In the Patna High Court

Awadhesh Mahto and Others

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 06-02-1979

Acts Referred:

Arms Act, 1959 — Section 27

Penal Code, 1860 (IPC) — Section 109, 173, 18, 221, 224

Citation : (1979) 02 PAT CK 0001

Hon'ble Judges : M.P. Singh, J

Bench : Single Bench

Judgement

M.P. Singh, J.—This is an appeal by four persons from a decision of the First Assistant Sessions Judge, Biharsharif. I shall refer to them by the serial numbers assigned in the memo of appeal as A-1, A-2 and so on. A-1 was sentenced to suffer 5 years" rigorous imprisonment u/s 307 of the Indian Penal Code (briefly "the Code"). He was further sentenced to 3 years" rigorous imprisonment u/s 27 of the Indian Arms Act, 1959, A-2 and A-3 were each sentenced to two years" rigorous imprisonment u/s 307/109 and A-4 to six months" rigorous imprisonment u/s 225.

2. The occurrence took place on 24th March 1969 at about 5 p.m. at village Bhadawa, Police Station Rahui in the District of Patna (now Nalanda). The incident was reported at the Police Station on the next day (25-3-1969 at 9 a.m.) by P. W. 6 Dhaka Gorain. The evidence is that A-1 to A-3 had a quarrel with P. W. 6 Dhaka Gorain over the construction of a Karha, that A-2 and A-3 ordered to assault. A-1 drew a loaded pistol from his Dhoti and pointed it at P. W. 6 Dhaka Gorain who was constructing the Karha for irrigating his land from the tube-well but before he had time to do anything further the Chawkidar Ram Nandan Paswan (P. W. 1) immediately snatched the Pistol from his hand and he was at once arrested. Another Chawkidar Tokhi Paswan (P. W. 1) who was also present there tied him with his turban and then the two Chawkidars began to take him to the Police Station. A-2 and A-3 fled from the spot. A-4 who was a Sarpanch and had in the beginning tried to pacify the quarrel between the parties untied the

turban and, thus, rescued A-I from the custody of the Chawkidars. The question is whether on this evidence the charge u/s 307 is sustainable. That section deals with attempt to murder and provides:

Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished etc.

On a perusal of the above it is quite clear that act which is punishable u/s 307 must be an act which is itself capable of causing death. Does the act of A-I aiming the loaded pistol at Dhaka Gorain amount to "an attempt to murder" within the meaning of Section 307 ? It is clear to me that it cannot because in a situation like this that section will apply when there has not been merely a commencement of an execution of the purpose but something little short of a complete execution, the consummation being hindered by circumstances independent of the will of the author. As observed in *Om Parkash Vs. The State of Punjab*, :

...in cases of attempt to commit murder by fire arm, the act amounting to an attempt to commit murder is bound to be the only and last act to be done by the culprit. Till he fires, he does not do any act towards, commission of the offence and once he fires, and something happens to prevent the shot taking effect, the offence u/s 307 is made out.

The matter is also clear from the illustrations (a) and (c) of Section 307. Illustration (a) runs as under

(a) A shoots at Z with intention to kill him, under such circumstances, that, if death ensued, A would be guilty of murder. A is liable to punishment under this section.

(c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and, if by such firing he wounds Z, he is liable to the punishment provided by the latter part of the first paragraph of this section.

From these two illustrations it may reasonably be inferred that the legislature intended that in cases of attempt to cause death by fire arm, the arm must be fired and till it is fired, no offence of attempt to murder as contemplated by Section 307 is committed. In the present case A-I had not fired the pistol. It is not a case of misfire. His act was nothing more than levelling a loaded pistol at Chaka Gorain and it could be termed only as an attempt to discharge a loaded arm. It is also not a case where A-I pulled the trigger and due to some mechanical defect in the pistol the bullet could not pass. It is simply a case in which he aimed the loaded pistol at Dhaka Gorain and before he could do anything the Chawkidars wrested the pistol from him. I, therefore, hold that the act of A-I pointing his pistol towards Dhaka Gorain is not "an attempt to murder" within the meaning of Section 307 of the Code. I may make it clear that the

present is not a case of causing death by starvation. If an accused person deliberately starves any person and denies food to him for days together and if in the meantime the victim somehow or other escapes from his custody, then the course of conduct adopted by the accused person in regular starving the victim in order to accelerate his end may come within the purview of Section 307 though it may not be his last act which if effective would cause death: see the case of Om Prakash (supra). In case of causing death by fire arm, however, the act amounting to an attempt to commit murder is bound to be the only and the last act to be done by the culprit. Till he fires he does not do any act towards the commission of the offence and once he fires, and something happens to prevent the shot from taking effect, the offence u/s 307 is made out. Under these circumstances the conviction of A-1 u/s 307 and that of A-2 and A-3 u/s 307/109 of the Code cannot be sustained.

3. Counsel for the State cited the case of Reg v. Duckworth (1892) 2 QB 83 : 40 WR 448 and on the basis of this decision contended that offence u/s 307 was made out. I do not agree with this contention. In that case the prisoner was convicted upon the fifth count of an indictment u/s 18 of 24 & 25 Vict. c. 100, which runs as follows:

Whosoever shall unlawfully and maliciously, by any means whatsoever, would cause any grievous bodily harm to any person, or shoot at any person by drawing a trigger or in any other manner attempt to discharge any kind of loaded arm at any person ...shall be guilty of felony....

It was held in that case that there was abundant evidence of an attempt upon which the prisoner could properly be convicted of an attempt to discharge the pistol within the meaning of the Statute. It is clear, that under the English law an attempt to discharge a loaded arm was an offence. Under the Indian Penal Code an attempt to discharge a loaded arm has not been made an offence and it is for the legislature to enact such a law. That case, therefore, has no application to the instant case. Accordingly the conviction of A-1 u/s 307 and that of A-2 and A-3 u/s 307/109 must be set aside. But a further question does arise as to whether they are guilty under any other section of the Code. In my opinion, A-1 would be guilty of an assault on the complainant. It is not in doubt that it is an assault u/s 352 of the Code to point a loaded pistol at any one: See Nga Waik v. King Emperor ILR (1923) Rang 209 The conviction of A-1 u/s 307, is, therefore, altered to one u/s 352 and that of A-2 and A-3 to one u/s 352/109 of the Code.

4. So far as the conviction of A-1 u/s 27 of the Arms Act is concerned it must be maintained because the offence under this section is made out of the evidence on record.

5. Learned counsel appearing for the appellants contended that A-4 Rampratap Mahto was a Sarpanch and he initially pacified the quarrel and his act in loosening or untying the turban from the person of A-1 could not have been done with the intention of rescuing A-1 from the custody of the Chawkidars. It was

urged that his act was merely for the purpose of pacifying the quarrel and, therefore, it was not an offence u/s 225 of the Code, the prosecution having failed to establish that A-4 intentionally rescued A-I from the lawful custody of the Chawkidars. The point has no force. The relevant portion of Section 225 is as under:

Whoever intentionally offers any resistance or illegal obstruction to the lawful apprehension of any other person for an offence, or rescues or attempts to rescue any other person from any custody in which that person is lawfully detained for an offence, shall be punished with imprisonment of either description for a term which may extend to 2 years, or with fine, or with both.

It is in two parts. The first part deals with a situation when there is resistance or illegal obstruction. In that case the prosecution is bound to prove that the resistance or obstruction was done intentionally. It is, however, not necessary to read the word "intentionally" with the word "rescue" in the second part of the section where the word "intentionally" is omitted. That the word "intentionally" is deliberately omitted in the second part is clear from certain provisions of the Code where the word "intentionally" is repeatedly used in each part of the offence in the said provision. Section 227 of the Code is as follows:

Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person under sentence of a Court of justice, for any offence or lawfully committed to custody, intentionally omits to apprehend such person, or intentionally suffers such person to escape, or intentionally aids such person in escaping or attempting to escape from such confinement, shall be punished as follows....

In this provision, the word "intentionally" is used in every part of the three offences mentioned in the said section. Similarly, Section 221 of the Code used the word "intentionally" repeatedly in three parts of the offences mentioned therein. Section 221, I.P.C. is as follows:

Whoever, being a public servant, legally bound as such public servant to apprehend or to keep in confinement any person charged with or liable to be apprehended for an offence, intentionally omits to apprehend such person, or intentionally suffers such person to escape or intentionally aids such person in escaping or attempting to escape from such confinement shall be punished as follows....

Similar is the case when we read Section 173. It is, therefore, clear from these provisions that whenever the intention is made the gist of the offence, it is said, so clearly in each part of the offence, If it was intended to make the intention as the gist of the offence of rescuing from lawful custody, the second part of Section 225 would have said so. I am, therefore, of definite opinion that the word "intentionally" cannot be read with the word "rescue" in the second part of Section 225. This view is supported by the decision, in *In re Kulandaivelu* AIR 1969 Mad 408 in which the same view with regard to the construction of Section

224 of the Code which was in similar language, was taken. Mr. K.P. Verma relied on *Alawal v. Emperor* AIR 1922 Lah 73 and contended that intention is an important ingredient in an offence u/s 225 of the Code. But that was a case of offering illegal obstruction and the act was covered by the first part of Section 225. Hence that case is distinguishable. In this view of the matter the conviction of A-4 u/s 225 must be upheld.

6. Now remains the question of sentence. A-1 Awadhesh Mahto is a Lecturer in a college and at the time of occurrence he was a student. He has already been in jail for about 15 days. Having regard to the facts and circumstances of this case I think that it will meet the ends of justice if the sentence of imprisonment imposed upon him is reduced to the period already undergone by him in jail. I, accordingly, set aside the excess imprisonment imposed on him and reduce it to the period already undergone by him and in addition I sentence him to pay a fine of Rs. 100/- only u/s 352 of the Indian Penal Code and also to pay further fine of Rs. 200/- u/s 27 of the Arms Act (the total, thus, being Rs. 300/-). If the fine is not paid he will have to undergo simple imprisonment for one month under each of the two counts. Counsel appearing for him said that his service will be affected if his conviction is maintained. I do not think so. It is not a case of moral turpitude or of any dishonest act. The quarrel was for a civil right. Therefore, the apprehension of the learned Counsel is without any foundation. In the facts and circumstances of this case sentence" of imprisonment imposed by the trial Court upon A-2 Devendar Garain and A-3 Santosh Garain also is set aside and instead each of them is sentenced to pay a fine of Rs. 100/- u/s 352/109 of the Indian Penal Code, in default they will have to undergo one month's simple imprisonment. The sentence of imprisonment on A-4 Rampratap Mahto the Sarpanch is also set aside and I sentence him to pay a fine of Rs. 100/- u/s 225 of the Indian Penal Code, in default to undergo 15 days simple imprisonment. With this modification in sentence the appeal is dismissed.